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Supreme Court of the United States

OCTOBER TERM, 1989

IN RE FOLDING CARTON ANTITRUST LITIGATION

Petition Of Certified Plaintiff Class In MDL-250 For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals has subject matter jurisdiction under Article III of the Constitution to vacate a district court's order approving a class action settlement agreed to by all parties where the appellants have no standing in the litigation.

2. Whether the judgment of the court of appeals vacating the district court's order approving a class action settlement where the only objectors had no standing in the litigation so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

LIST OF PARTIES

Petitioner is the plaintiff class consisting of:

All persons in the United States (excluding defendants, their subsidiaries, affiliates, or agents), who purchased folding cartons from any of the defendants in these actions during the period from January 1, 1960 to December 31, 1974.

The defendants were Alton Box Board Company, American Can Company, Brown Company, Burd & Fletcher Company, F. N. Burt Company, Inc., Champion International Corporation, Consolidated Packaging Corporation, Diamond International Corporation, Eastex Packaging, Inc., Federal Paper Board Company, Inc., Fibreboard Corporation, The A. L. Garber Company, Inc., Georgia-Pacific Corporation, Gulf States Paper Corporation, Hoerner Waldorf Corporation, International Paper Company, Interstate Folding Box Company, The Mead Corporation, Olinkraft, Inc., Packaging Corporation of America, Potlatch Corporation, Rexham Corporation, St. Regis Paper Company, Weyerhaeuser Company, and Container Corporation. These defendants were not parties to the proceedings in the court of appeals. The class representatives in the court of appeals were Beatrice Companies, G. Heileman Brewing Co., Grist Mill Co., Land O'Lakes, Inc., Cumberland Farm Dairies, Inc. and Pantry Pride Enterprises, Inc. Anheuser Busch Companies, Inc., also was a party in the court of appeals. The United States was the appellant in the court of appeals. The Folding Carton Administration Committee, which was created by the district court to act on its behalf in settlement distributions and in the court of appeals, filed a brief on behalf of the district court in the court of appeals.

This Petition should be read in conjunction with the Petition for Writ of Mandamus or Prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, Judges of the United States Court of Appeals for the Seventh Circuit, or, in the Alternative, Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed on December 8, 1989, under the caption *In re Hubert L. Will*, which seeks relief from the same judgment as this Petition.

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Petition Of Certified Plaintiff Class In MDL-250 For A Writ Of Certiorari To The United States Court Of Appeal's For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the certified plaintiff class in *In re Folding Carton Antitrust Litigation*, MDL-250, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 11, 1989.

Opinions Below

The court of appeals issued the order from which petitioner seeks relief on September 11, 1989 ("*Folding Carton II*") (Appendix A).[1] The court of appeals issued a written opinion on August 9, 1989, which appears at 881 F.2d 494

[1] References are to the Appendix to the Petition for Writ of Mandamus or Prohibition to the Honorable Harlington Wood, Jr., Richard D. Cudahy and Michael S. Kanne, Judges of the United States Court of Appeals for the Seventh Circuit, or, in the Alternative, Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit filed on December 8, 1989, under the caption *In re Hubert L. Will*, which seeks relief from the same judgment as this Petition.

and which is the basis for the September 11, 1989, order (Appendix B).

The court of appeals denied Petitions for Rehearing and Suggestion for Rehearing In Banc filed by Judge Hubert L. Will and certain class members on September 15, 1989 (Appendix E).

The following opinions and orders relate to this litigation and are also reproduced as appendices: the court of appeal's opinion issued September 5, 1984, reported at 744 F.2d 1252 (Appendix G); the district court's opinion, issued February 17, 1983, reported at 557 F. Supp. 1091 (Appendix I); and the district court's opinion, issued May 24, 1988, on remand from the court of appeal's September 5, 1984 decision, reported at 687 F. Supp. 1223 (Appendix J).

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1989. On September 15, 1989, the court of appeals denied petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The question in this case is whether a court of appeals has jurisdiction to vacate the approval of a settlement agreed to by *all parties* to the litigation and then remake the settlement to its liking where the only appellants had no standing in the litigation. This Court has consistently held that when a case becomes moot for lack of controversy at any stage of the proceedings, federal courts no longer have jurisdiction to preside over the litigation. *E.g., Steffel v. Thompson,* 415 U.S. 452 (1974); *United States v. Munsingware,* 340 U.S. 36 (1950). The judgment of the court of appeals is in direct conflict with this long line of decisions by this Court.

Besides injecting itself into a case that was settled with the consent of all parties and as to which it had no jurisdiction, the court of appeals took the further misstep of attempting to reshape one part of the settlement because the court of appeals felt it was inconsistent with the spirit of its earlier decision in *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984), *cert. dismissed sub nom. G. Heileman Brewing Co. v. Folding Carton Admin. Comm.*, 471 U.S. 1113 (1985) ("*Folding Carton I*"). The ruling of the court of appeals is an unprecedented exercise of judicial activism and marks such a profound departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's supervisory powers to set matters straight.

A. Background: The Settlement Agreement, The Reserve Fund And The Court of Appeal's Decision in *Folding Carton I*

Petitioner is the plaintiff class of over 2700 purchasers of folding cartons who sought damages from 24 defendants in multi-district antitrust litigation begun in 1976. The plaintiff class was certified by order of the district court on April 19, 1977, and an executive committee of plaintiffs' counsel was appointed to pursue the litigation on behalf of the class. After four years of pretrial proceedings and extensive discovery the class litigation was settled with all defendants, and defendants paid approximately $200 million into an escrow account. The district court appointed an Administration Committee to assist it in administering this settlement fund.

The Administration Committee reviewed all claims filed. By March 1980, the Administration Committee recommended net payments of approximately $200 million to claimants. Notices were sent to all claimants and a report was filed with the district court by the Committee. Over $200 million was paid out to claimants in April 1980. The payout to class members represented approximately 97% of

the settlement fund. As part of the distribution, part of the settlement fund was set aside after fees and expenses to cover mistakes in calculation, claims sent but not received or acted upon, costs of administration and potential late claims. After March 1980, late claims were processed and paid but by mid-1982, due in large part to prudent claims administration and investment, approximately $6 million still remained in the fund (the "reserve fund").

In the fall of 1982, the plaintiff class and the defendants both filed motions claiming the $6 million in the reserve fund for themselves. At the request of the district court, the Administration Committee responded and, relying on a *cy pres* theory, suggested that any excess funds after payment of any additional late claims be set aside in a foundation for research into the antitrust laws and complex multidistrict litigation. The district court considered the objections of certain class claimants, the defendants and the recommendations and suggestions of the Administration Committee. In its 1983 opinion, the district court decided that the excess funds should be used first to pay late claimants and that any funds remaining thereafter be used to establish the research foundation suggested by the Administration Committee. *In re Folding Carton Antitrust Litigation,* 557 F. Supp. 1091 (N.D. Ill. 1983).

Thereafter, six of the class claimants and two of the original settling defendants appealed the district court's decision. After briefing and argument the court of appeals affirmed in part and reversed in part in *Folding Carton I.* The court of appeals held that the proposed payments to previously unpaid late claimants was proper. However, it reversed the district court's decision to use the reserve fund to establish a tax-exempt research organization. Instead, the court of appeals directed that excess funds after payment of late claims be deposited pursuant to 28 U.S.C. §§ 2041, 2042 to be held by the United States as an escheat. In so ruling the court stated that its decision was "clearly correct under

§§ 2041, 2042 and that the issue seldom recurs." It also stated that its direction to deposit funds pursuant to 28 U.S.C. § 2042 was consistent with a congressional mandate for disposition of the fund. For these reasons the court concluded that Supreme Court review was unwarranted. It therefore denied the pending motion for stay of its mandate, which was issued on October 17, 1984.

B. Petitions Filed In This Court For Review Of *Folding Carton I* And The Reserve Fund Settlement

In January 1985, Judges Erwin A. Robson and Hubert L. Will filed in this Court their petition for a writ of mandamus, or in the alternative for a writ of certiorari to the Seventh Circuit Court of Appeals. Several class representatives also filed a petition for a writ of certiorari. The grounds cited for issuance of the writ were that the rulings of the court of appeals contravened the sound exercise of appellate jurisdiction when it substituted its findings and discretion for that of the district court and that the court's interpretation of § 2041 and § 2042 was a serious error of law and created a conflict in the circuits.

Settlement negotiations among all the parties took place while these petitions were pending. On March 27, 1985, a settlement proposal executed by representatives of the class members (including the paid claimants, late claimants and all class members who objected to the initial settlement) and all objecting defendants was submitted to the district court for its approval. The settlement provided for the payment of attorneys' fees and costs of administration and the payment of any additional late claims until December 31, 1985. The balance of the reserve fund was to be divided—half to all class members who received or were entitled to receive payments and half to two or more Chicago area law schools "for the purpose of further research projects involving analysis and enforcement of antitrust laws and/or the improved

management of complex multi-party litigation and/or scholarship assistance for needy students".

After *Folding Carton I* was decided, class counsel on six occasions notified the United States Attorney in Chicago of the status of the proceedings. At the hearing on March 27, 1985, one of the attorneys for the class informed the district court that at a meeting the day before, the Chief of the Civil Division of the United States Attorneys Office in Chicago indicated that the government had reviewed the proposed settlement and had no objection to it. On March 28, 1985, the district court approved the settlement reached by the parties and entered the Stipulated Order of Settlement. As provided in the order, the petitions for certiorari then pending in this Court were promptly withdrawn. Judges Robson and Will also withdrew their petition for mandamus.

The settlement was then implemented. Notices were published, late claims were filed and the Administration Committee reviewed them. The district court entered orders approving late claims on September 29, 1986, and directed that payments be made from available funds as soon as practicable. Payments were made in October 1986. After payment of late claims and reasonable costs of administration and attorneys' fees, approximately $3.6 million of the reserve fund remained. This fund was divided into two equal parts as provided in the settlement order, and on December 19, 1986, the district court ordered payment of half of the funds pro-rata to all class members who previously received payments on their claims. The payments were made on December 30, 1986.

In October 1986, the district court directed the Administration Committee to advise the Chicago area law schools of the existence of certain funds available to them under the Stipulated Order of Settlement and to request that proposals be submitted on or before November 15, 1986. All the Chicago law schools submitted proposals. The district court, with assistance from the Committee, reviewed the proposals

and entered two orders directing funds be paid $1.2 million to Loyola University of Chicago and $156,000 to the University of Chicago. The payment of $1.2 million to Loyola University was made on March 12, 1987, but the money is being held in escrow pending disposition of all matters in the litigation. The payment to the University of Chicago has not yet been made and remains in the reserve fund.

C. The Orders Reviewed In *Folding Carton II*

On February 11, 1987, a *qui tam* complaint captioned *United States ex rel. Paul Houck v. Folding Carton Administration Committee, et al.*, No. 87 C 1253 was filed under seal in the United States District Court for the Northern District of Illinois. Plaintiff Paul Houck sued the Committee, its members, their law firms and counsel for the various parties who signed the Stipulated Order of Settlement. Houck claimed the settlement was contrary to the law of the case as set forth in *Folding Carton I*. Houck sought, in the name of the United States, to recover damages against defendants under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, and on the common law theories of breach of fiduciary duty and constructive trust. As provided in the False Claims Act, the *Houck* complaint was held under seal for a period of 60 days to allow the government to consider whether it would intervene and take over prosecution of the case. 31 U.S.C. § 3730(b)(2). After obtaining an extension of this period, the government declined to intervene, and so advised the district court on May 12, 1987. On January 20, 1988, the district court in the *Houck* case granted defendants' motion to dismiss on the grounds of lack of subject matter jurisdiction. 1988-2 Trade Cas. (CCH) ¶ 68,176 (N.D. Ill. Jan. 20, 1988). In February 1988, Houck appealed.

On July 9, 1987, two months after the government declined to pursue any interest it might have in *Houck* and 18 months after being explicitly advised of its potential interest in the reserve fund, the government filed motions in

the district court to intervene and to vacate the Stipulated Order of Settlement in *In re Folding Carton Antitrust Litigation.* On May 24, 1988, the district court (Will, J.) denied the government's motions to intervene and to vacate the settlement. 687 F. Supp. 1223. Like Houck, the government appealed.

D. The Court of Appeal's Decision in *Folding Carton II*

In *Folding Carton II* the court of appeals first affirmed the district court's denial of intervention sought by the government and also affirmed the dismissal of *Houck* for lack of subject matter jurisdiction. Thus, the court of appeals affirmed the two district court opinions which eliminated from the litigation the only two litigants who objected to the settlement and who could have formed the basis for a case or controversy.

But instead of simply ending its opinion at that point for lack of a case or controversy, the court of appeals went on to address the settlement agreed to by all parties. The court affirmed one part of the settlement: allowing the class to keep the one half of the reserve fund that had been distributed to class members. But the court of appeals rejected the other part of the settlement—the disposition to the law schools for research relating to antitrust litigation. Instead the court remanded the case with directions that the reserve fund in this antitrust case be disposed of under *cy pres* principles, but not for any purpose relating to antitrust research. The court of appeals cited no authority for its reversal of the district court's approval of the *cy pres* disposition of the reserve fund to the law schools, and on remand it invoked Seventh Circuit Rule 36 to take the case away from Judge Will.

REASONS FOR GRANTING THE WRIT

I. This Court Must Prevent the Courts of Appeal From Deciding Matters in the Absence of Any Case or Controversy to Protect Against the Perils of Judicial Adventurism

It is axiomatic that in our constitutional framework the task of the judiciary is to resolve controversies and not to reach out beyond that special competence to step into a case where the controversies between the parties have been fully resolved. *Diamond v. Charles*, 476 U.S. 54, 61-62 (1986); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937). If a controversy has been settled by all the parties to the litigation, it is considered moot and federal courts are without power to decide moot questions. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974); *Local No. 8-6 v. Missouri*, 361 U.S. 363 (1960). "The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. at 459 n. 10 (1974) (citations omitted).[2]

The only way the court of appeals could properly reach the merits of the settlement agreed to by all parties and approved by the district court would be if some third party gained entry into the litigation with proper standing to object. But the court of appeals did a strange and unprecedented thing in *Folding Carton II*. It affirmed two separate orders of two district courts which denied standing to the only two objectors to the settlement. It affirmed Judge Will's denial of the government's petition for leave to intervene and it affirmed Judge Norgle's dismissal of the *qui tam* relator's

[2] *See also Christianson v. Colt Industries Operating Corp.*, 484 U.S. 985 (1988); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440-41 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

complaint. The government and the *qui tam* relator were the only objectors to the settlement. Because these parties had no standing to object, there was no Article III case or controversy left to adjudicate. Without a case or controversy as a predicate to further judicial competence, the Court in *Folding Carton II* should simply have ended its opinion at that point. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988) ("[I]f the litigants do not have standing to raise their claims the court is without authority to consider the merits of the action."). The court of appeals had no subject matter jurisdiction to proceed to restructure the parties' settlement after it affirmed the denial of standing to the government and the *qui tam* relator.

II. The Writ of Certiorari Should be Granted to Clarify the Role of the Courts of Appeal in Reviewing Class Action Settlements

A. The Judgment of the Court of Appeals is an Intolerable Intrusion into a Settled Case

Courts may not intrude into settled matters even though the courts may have very different views of what the outcomes ought to be if they were parties. *In re S.L.E. Inc.*, 674 F.2d 359, 364 (5th Cir. 1982) ("Judicial power is not exercised . . . to confirm the wisdom of private settlements already reached and honored.") (citations omitted). But that is exactly what the court of appeals did here. The court of appeals cited no precedent for its intrusion into the parties' settlement, but its discussion of its claimed power to do so is instructive. After observing that "some cases, however, may be appropriately settled by the parties on a different basis even after being resolved otherwise by this court," 881 F.2d at 499, the court attempted to distinguish this case on two grounds, both of which are wrong.

First the court of appeals stated that the Administrative Committee and the district court were not in the "true and

ordinary sense" prevailing parties who could determine what to do with the reserve fund. But the court omitted from its analysis the interest of the one party that unquestionably had the strongest equitable interest in the disposition of the reserve fund—namely the plaintiff class for whom the settlement fund, and the resulting reserve fund, was created in the first place.

Certain class representatives contended all along that the full reserve fund should be paid only to class members, the only victims of the price fixing conspiracy. That is why these class members vigorously opposed the establishment of the Foundation, opposition that led to the Foundation's demise in *Folding Carton I*. The settlement finally reached in 1986—half of the fund to the class and half for law school grants—was a fair settlement for the class. And the class has a vital interest in seeing that the settlement is carried out, including the grants to the law schools.

In its reasoning the court of appeals totally ignored the interest of the class in the disposition of the reserve fund, an interest perhaps of more importance than that of any other party to the litigation. The class gave up a valuable and irretrievable right, its certiorari petition to this Court from what it firmly believed to be the plainly erroneous ruling in *Folding Carton I* that the reserve fund should escheat to the government—a non-party to the case. The class gave up its certiorari petition as part of a settlement in which it traded its claim to *all* the reserve fund for the certain bird-in-hand it obtained in the settlement—one half the reserve fund with the other half going to the law schools for antitrust *cy pres* uses.[3]

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[3] Because the district court and certain class members sought review on behalf of the class in this Court, the decision in *Folding Carton I* was not final and was not an impediment to settlement. *See Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1167-69 (7th Cir. 1980), *aff'd on other grounds sub nom., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). Thus, while the certiorari petitions were pending and in the absence of finality, the parties were free to fashion a settlement appropriate to their particular needs.

The second reason assigned by the court of appeals for striking down the *cy pres* disposition to the law schools was that the settlement failed to give proper respect to the court's "direction" in *Folding Carton I* that the reserve fund escheat to the government. The obvious problem with this analysis is that the government was never a party in either *Folding Carton I* or *Folding Carton II*, and the court had no jurisdiction to "direct" that the funds be given to the government or any other non-party—*suggest* perhaps, but not *direct*.

The panel's application of the *cy pres* doctrine to rewrite this settlement agreement was improper. The *cy pres* doctrine traditionally applies where a settlement agreement is *silent* concerning the distribution of unclaimed funds. *E.g.*, 2 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 10.15 at 372 (1985). The doctrine does not apply here, where the parties expressly agreed on the distribution of the reserve fund, the settlement agreement was approved by the district court and no party had standing to object to its approval. *See Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 816 (5th Cir. 1989) (approving settlement on appeal of district court's *cy pres* order where only objector's motion to intervene was denied).

Moreover, the *cy pres* doctrine "puts the unclaimed fund to its next best compensation use, e.g., for the aggregate, indirect prospective benefit of the class . . . . " 2 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 10.17 at 374; *e.g.*, *Six (6) Mexican Workers v. Arizona Citrus Growers*, 641 F. Supp. 259, 265 (D. Ariz. 1986) ("When the entire damage fund is not claimed by class members, the fund is put to its 'next best' use which furthers the original purpose of compensation of individual victims."); *see also Simer v. Rios*, 661 F.2d 655, 675-77 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). If the other half of the fund can't go directly to the class, where better than a use squarely related to antitrust enforcement? Granting half of the fund to the law schools to promote better enforcement of the antitrust laws and better understanding of complex litigation is certainly the *next best*

use of the money and in the best interest of the class, the victims of the nationwide antitrust conspiracy.

What is so strikingly odd about the decision in *Folding Carton II* is that the court appeared to order that any use of the reserve fund *other than* one relating to the antitrust laws will be tolerated on remand. This isn't what the class had in mind when it reluctantly agreed to the settlement. Any *cy pres* disposition of the balance of the fund, to make any sense *in the context of this case*, had to go to recipients whose work related at least in part to better enforcement of the antitrust laws, which by nature involve complex litigation. Any other use would torture the *cy pres* doctrine beyond all recognition.

Because the opinion gives us no clue, we cannot ascertain what standard of review the court of appeals applied in reversing the district court. The standard cannot be error of law as the district court applied the time honored "next best use" *cy pres* doctrine which by no stretch can be deemed error. If it was the more deferential standard, abuse of discretion, then two elements are missing: abuse and an objecting party. *See Barona Group of Capitan Grande Band v. American Management & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 109 S. Ct. 7 (1988). It is not surprising that the court of appeals cited no authority whatsoever for reshaping to its liking the settlement agreed to by all parties and approved by the district court. There is none.[4]

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[4] The court of appeals cited no authority for its strange *cy pres* ruling, although there is one case in the dim reaches of the past that might support its view. In *DeCosta v. DePas*, 27 Eng. Rep. 150 (Ch. 1754), a Jewish testator established a testamentary trust of 1200 pounds to be used to care for and teach the Jewish religion to poor Jewish children. But in 1754 Judaism was not a recognized religion in England so the chancery court invalidated DePas's testamentary trust and instead ordered the money used to support an Anglican preacher to instruct the children in his care in the Christian religion.

B. The Judgment of the Court of Appeals Is Diametrically Opposed to Sound Federal Judicial Administration

The court of appeal's attempt to reshape the settlement marked an extreme departure from the proper role of the appellate courts in reviewing class action settlements. Most class actions are complex lawsuits which impose heavy burdens on the federal judicial system. *In re Folding Carton Antitrust Litigation* was no different. It was one of the largest antitrust cases ever to enter the federal courts, with a class of over 2700 and 24 defendants. Fortunately, most class actions are settled, and over the years the courts have fashioned sensible mechanisms for facilitating settlement of these complex cases. *See In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). Preserving the discretion of district courts in approving settlements that end class litigation and the limited scope of review by courts of appeal are essential to this workable settlement methodology. *See, e.g., Gautreaux v. Pierce*, 690 F.2d 616 (7th Cir. 1982).

The serious threat posed by the court of appeals ruling is that the ruling endangers the judicial processes which have been carefully developed to oversee class settlements, an important part of which is the limited role of the courts of appeal. The court of appeals here ignored the limitations on its role and instead inserted itself as an advocate with standing to upset one part of the settlement agreed to by all parties to the litigation. What makes the court's ruling all the more bizarre is that after it (1) denied standing to the only objectors with the potential to become parties, and (2) ordered that the fund remaining in this antitrust case *not* be used for antitrust purposes, it (3) suggested that the reserve fund might better go to a research institution of *its* choice (the Federal Judicial Center) rather than the research institutions agreed to by the parties (the law schools).

If the ruling below is allowed to stand, it will be an open invitation to the courts of appeal to substitute their unfettered discretion for that of the parties and the district courts as to how class cases should be settled. As a result, especially in the many class actions where settlement funds remain unclaimed, class litigation will not have the finality that settlements are supposed to achieve. And that is just what has happened here. Already, in addition to the University of Chicago and Loyola University of Chicago law schools, a host of applicants have sought intervention below to claim a share of the reserve fund.[5] Another round of litigation is in store, surely in the district court and perhaps in the court of appeals if on review of the next district court order the court of appeals again decides it dislikes the way the reserve fund is disposed of. No end is in sight, and the mischief created here, if not checked from spreading by this Court, is more than our already overloaded judicial system should bear.

[5] Petitions for leave to intervene seeking a grant of the reserve fund have already been filed in the district court by The Chicago Lawyers Committee For Civil Rights Under Law, The Legal Assistance Foundation, The Legal Aid Society, the Federal Judicial Center and the State Attorneys General For Antitrust and Consumer Protection Law Enforcement.

CONCLUSION

For the foregoing reasons the Court should issue the writ of certiorari sought by this Petition.

Dated: December 11, 1989

Respectfully submitted,

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Supreme Court, U.S.
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Nos. 89-927, 89-992 and 89-1001

In the Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

CERTIFIED PLAINTIFF CLASS IN MDL-250, PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN AND ALEXANDER R. DOMANSKIS, PETITIONERS

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals has authority to vacate in part a settlement agreement in violation of the court's prior, outstanding mandate.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-927

IN RE HUBERT L. WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PETITIONER

No. 89-992

CERTIFIED PLAINTIFF CLASS IN MDL-250, PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

No. 89-1081

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN AND ALEXANDER R. DOMANSKIS, PETITIONERS

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, 89-927 Pet. App. 1b-22b, is reported at 881 F.2d 494. The opinion of the district court, 89-927 Pet. App. 1j-30j, is reported at 687 F. Supp. 1223.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1989. A petition for rehearing was denied on September 15, 1989. 89-927 Pet. App. 1e-2e. The petition for a writ of mandamus or prohibition or, in the alternative for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari in No. 89-992 and No. 89-1081 were filed on December 11, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1651(a) and 28 U.S.C. 1254(1).

STATEMENT

This case concerns the disposition of a several million dollar surplus remaining in the *Folding Carton* antitrust litigation settlement fund (known as the reserve fund). In the first of two decisions regarding the reserve fund, the Court of Appeals for the Seventh Circuit held that 28 U.S.C. 2042 requires the surplus to be deposited in the United States Treasury "in the name and to the credit of the United States." Subsequently, the parties to the class actions, with the approval of the district court, entered into settlement agreements that purported to disburse the reserve fund in a manner inconsistent with the court of appeals' mandate. The United States ultimately contested those agreements and sought to enforce the mandate of the court of appeals. In a second decision, which petitioners ask this Court to review, the court of appeals held that the agreements conflicted with the court's original mandate and must be set aside in part. At the same time, the court held that although its original mandate ran in favor of the United States, the United States is equitably estopped from seeking enforcement of the mandate and the statute on which it rests.

1. The present civil litigation grows out of a 1975 criminal antitrust suit brought by the United States against more than 70 manufacturers of folding cartons and their corporate officers. That suit charged the manufacturers and their

officers with conspiring to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The United States prevailed in that litigation against virtually all the defendants. See generally *United States* v. *Alton Box Board Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,336 (N.D. Ill. 1977).

In the wake of the government's successful criminal prosecution, customers of the folding carton manufacturers filed civil class actions and renewed the price-fixing allegations that underlay the criminal suit. The civil actions were consolidated in the United States District Court for the Northern District of Illinois. See *In re Folding Carton Antitrust Litigation*, 415 F. Supp. 384 (J.P.M.L. 1976).

In September 1979, all of the class actions were settled by the defendants' establishing a $200 million fund to be distributed to class member carton purchasers pursuant to an agreed-upon plan. Gov't C.A. App. 49. Disbursements from the settlement fund were processed by an Administration Committee appointed by the district court. Gov't C.A. App. 50.

2. After all payments to the class claimants were made, approximately $6 million remained in the settlement fund. Gov't C.A. App. 51. In February 1983, the district court issued an order governing the distribution of that surplus, which the court called the "reserve fund." 89-927 Pet. App. 1i.

The district court first determined that the antitrust defendants had no claim to legal ownership of the reserve fund because the settlement agreement provided for irrevocable transfer of the money to the settlement fund. 89-927 Pet. App. 15i. It next ruled that the previously paid plaintiff class claimants likewise had no legal claim to the remaining funds; under the settlement agreement, their recovery was a fixed percentage of their total purchases of relevant material

during the applicable period, a sum which they had already received. 89-927 Pet. App. 17i-18i. The court then held that the plaintiff class members who had failed to file timely claims also had no legal interest in the excess funds. 89-927 Pet. App. 20i-21i. Finally, the district court rejected any theory that the money escheated to either the State of Illinois or the United States. 89-927 Pet. App. 21i.

Turning from legal to equitable considerations, the district court determined that neither the antitrust defendants nor the previously paid claimants and their attorneys had valid equitable claims to the surplus funds. The court also determined, however, that the plaintiff class members who had not yet sought payments had cognizable equitable claims. 89-927 Pet. App. 24i-28i. Accordingly, the district court ordered that renewed efforts be made to locate any remaining plaintiff class members who had not made claims, and that the reserve fund be held for one year to meet any such late claims. 89-927 Pet. App. 33i-34i. At the end of that one-year period, the court ordered that surplus funds be transferred to a tax-exempt foundation established to study promotion of judicial management of complex litigation (primarily antitrust cases), to promote research and implementation of various aspects of the antitrust laws, and to pay possible future claims. *Ibid.*

3. Several defendants and plaintiff class members appealed the district court's ruling governing the disposition of the reserve fund. On appeal, the Court of Appeals for the Seventh Circuit affirmed that part of the district court's order holding that neither the defendants nor the previously paid claimants had any claim to the surplus funds. 89-927 Pet. App. 3g. The court of appeals also agreed that the surplus funds should be held for one year to cover any cognizable late claims by class members. 89-927 Pet. App. 4g.

But the court of appeals expressly reversed the district court's plan to use the remaining funds for a tax-exempt foundation, calling it a "miscarriage of justice and an abuse of discretion." 89-927 Pet. App. 4g. Instead, the court of appeals ruled that funds left over after payment of late claims must be disposed of pursuant to 28 U.S.C. 2041 and 2042. 89-927 Pet. App. 4g. Section 2041 provides that all funds "paid into any court of the United States" or "received by the officers thereof" in pending or adjudicated cases "shall be deposited forthwith with the Treasurer of the United States * * * in the name and to the credit of such court," subject to later delivery to "the rightful owners." Section 2042 provides that when "the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute," and the money has remained unclaimed for five years, the court then "shall cause such money to be deposited in the name and to the credit of the United States." Once this transfer has taken place, Section 2042 permits "[a]ny claimant entitled to such money" to obtain its money by petitioning the court and giving notice to the United States Attorney.

The court of appeals ruled that 28 U.S.C. 2042 governs the disposition of any surplus remaining in the reserve fund. 89-927 Pet. App. 4g-5g. The court noted that the "escheat" provided for by Section 2042 is not permanent because the United States must pay the funds to proper claimants if they appear. 89-927 Pet. App. 5g. The court of appeals did not remand the matter to the district court; rather, it used mandatory language specifying that the Administration Committee should hold the reserve fund available for one year and that the remainder of the reserve fund "shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042." 89-927 Pet. App. 6g.

In response to a rehearing petition, the court of appeals emphasized that its order "merely implements a direct

Congressional mandate for the disposition of residual funds deposited with a district court." *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1259 (7th Cir. 1984). The court of appeals explained that it had not simply substituted its equitable judgment for that of the district court, but rather had ordered disposition of the funds pursuant to the statutory requirement of Section 2042. The district court had abused its discretion because it lacked authority to establish a research foundation and to fund it with the unclaimed money from the reserve fund. 744 F.2d at 1260. The court of appeals clarified that its use of the term "escheat" to describe the process under Section 2042 was not meant "in the same sense as reference to escheats to the states." *Ibid.*

On October 11, 1984, the court of appeals denied a motion to stay its mandate. The court observed that no judge had requested en banc review, that its ruling disposing of the surplus in the reserve fund in accordance with 28 U.S.C. 2042 was clearly correct, and that this issue "seldom recurs." Gov't C.A. App. 16. Consequently, the court of appeals' mandate issued on October 17, 1984, and was entered on the district court docket sheet. Gov't C.A. App. 17. That mandate has never been recalled.

4. The United States had no involvement in the civil antitrust litigation up to that time. In December 1984, the parties notified the United States Attorney's Office in Chicago that the court of appeals had ruled that, after the year for late claimants had run, the United States was to take control of the surplus in the reserve fund pursuant to 28 U.S.C. 2042. At the same time, however, several parties had filed certiorari petitions in this Court, and the district judges who had presided over the district court proceedings themselves had filed a petition for a writ of mandamus or certiorari in this Court.

While the various petitions seeking this Court's review were pending, the parties—none of whom had a legal or equitable interest in the reserve fund after payment of late claims—negotiated a settlement agreement among themselves which disposed of the reserve fund in a manner contrary to the court of appeals' mandate. After payment of late claims by September 1985, the parties agreed—despite the unequivocal wording of the court of appeals' opinion—that they would divide the remaining money in two parts: one half would be paid *pro rata* to all previously compensated class members; the other half would be paid to two or more Chicago area law schools to fund research projects involving enforcement of the antitrust laws and management of complex litigation, and to assist law students in financial need.[1] Gov't C.A. App. 29-32.

The parties submitted this settlement proposal to the district court at a hearing on March 21, 1985. The district court recognized that the court of appeals' mandate had issued. But it asserted that the court of appeals' ruling—which the district court described as "silly"—was not "final" and therefore did not bind the district court. Gov't C.A. App. 20-22. (Paradoxically, the district court requested the parties to ask the court of appeals to extend the time for filing late claims. Gov't C.A. App. 23.) In any event, the district court stated that the parties "better" check with the U.S. Attorney's office to see "whether they have any position they want to take." Gov't C.A. App. 24. One of the attorneys for the parties apparently met with a supervising Assistant United States Attorney, who told him that the United States had no objection to the entry of the settlement. Gov't C.A. App. 58.

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[1] A copy of the proposed settlement was sent to the U.S. Attorney's Office on March 18, 1985. Gov't C.A. App. 57.

On March 27, 1985, the district court held a second hearing on the proposed settlement. Although it acknowledged one party's concern that the district court could not approve a settlement under the circumstances, Gov't C.A. App. 26, the court nevertheless did so. At the end of the hearing, counsel for some of the previously paid claimants told the court that, although no representative from the U.S. Attorney's office was present, that office had been consulted and had indicated "no objection to this resolution of the dispute." Gov't C.A. App. 28.

The settlement was signed by representatives of the parties on March 28, 1985, and was approved by the district court on April 1, 1985. No one signed the settlement on behalf of the United States. Gov't C.A. App. 29-32. In May 1985, the district judges and the parties moved to dismiss the petitions they had filed in this Court, and the various petitions were then dismissed under then-applicable Sup. Ct. R. 53 (1980). *In re Robson*, 471 U.S. 1120 (1985).[2]

In early 1986, a member of the claimant class that had not previously filed a claim, Anheuser-Busch Companies, Inc., moved to vacate the settlement. Anheuser-Busch asserted that the March 1985 settlement was "in direct contradiction to the mandate" of the court of appeals insofar as it provided for further payments to previously paid claimants and for grants to Chicago law schools. The company contended that only payment to late claimants would be consistent with the court of appeals' ruling.

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[2] Petitioner in No. 89-927 states that the petitions were "voluntarily dismissed as moot." Pet. 8. Under Rule 53.3, however, no mandate or other process is issued pursuant to the voluntary dismissal unless this Court directs otherwise. Because no mandate or process was issued by this Court, the Rule 53 dismissal in this case did not determine that the case was moot, nor did it vacate the Seventh Circuit's outstanding mandate.

Although the motion to vacate the settlement was fully briefed, the district court never ruled on it because the parties agreed to amend the March 1985 settlement to pay Anheuser-Busch and other late claimants. Gov't C.A. App. 36-37, 40. The district court approved this superseding settlement agreement in September 1986, even though it left intact the provisions of the March 1985 settlement that Anheuser-Busch had attacked as violative of the court of appeals' September 1984 ruling. Gov't C.A. App. 36-37. In December 1986, the district court ordered disbursement of approximately $0.6 million to late claimants and more than $1.7 million to previously paid claimants. Gov't C.A. App. 7.[3] There is no indication that the United States received advance or contemporaneous notice of the superseding settlement agreement or any of the other activities occurring after the March 1985 settlement.

5. In February 1987, an unpaid late claimant filed a *qui tam* action under seal pursuant to the False Claims Act, 31 U.S.C. 3729 *et seq.* The *qui tam* plaintiff contended that the settlement negotiated by the parties and approved by the district court violated 28 U.S.C. 2042 and the court of appeals' mandate.

Under the False Claims Act, the federal government had the option to decide whether or not to intervene and proceed with the litigation. While the Justice Department was considering whether to do so, in March 1987, the district court ordered that $1.2 million from the reserve fund be paid to Loyola University School of Law for one of the research projects contemplated by the March 1985 settlement. Gov't C.A. App. 8. The order allowed the school to use the interest generated by the principal amount with a reversionary interest in the district court. Six days later, the

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[3] At that point, the surplus in the reserve fund totaled more than $7 million. Gov't C.A. App. 59-60.

United States made an emergency motion to vacate or stay that order as violative of the court of appeals' mandate. Gov't C.A. App. 45-46.[4]

In May 1987, the Justice Department decided not to intervene in the *qui tam* action.[5] Shortly thereafter, in June 1987, the district court ordered that $156,000 of the reserve fund be transferred to the University of Chicago Law School for another research project contemplated by the March 1985 settlement. Gov't C.A. App. 9.

Several weeks later, on July 14, 1987, the United States moved to intervene in the district court pursuant to Federal Rule of Civil Procedure 24(a) and to vacate the settlement as violative of the court of appeals' mandate. The government argued that the district court lacked authority to enter an order disposing of the excess funds in a manner plainly in contravention of the appellate mandate, which had never been withdrawn or overruled and which therefore stood as the law of the case. The United States further argued that no representative of the United States had ever appeared in court to agree to the stipulated settlement; that the settlement was not signed by any representative of the United States; and that none of the parties had ever consulted with or received either written or oral approval from a representative of the United States authorized to settle a matter involving several million dollars. Because no one in authority had approved the settlement on behalf of the government, the United States urged that the settlement was a nullity.

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[4] At that time, the government notified the district court *in camera* of the pending *qui tam* action.

[5] That action was subsequently dismissed because the plaintiff was not a proper relator under the False Claims Act. The dismissal order was appealed to the court of appeals, which affirmed the dismissal of the *qui tam* action in the same decision now before this Court. 89-927 Pet. App. 17b-22b. No party has asked this Court to review the *qui tam* ruling.

On May 24, 1988, the district court denied the motions filed by the United States. It held that the motion to intervene was untimely, and in the alternative held that, even if the intervention request was timely, the motion to set aside the settlement must be denied. 89-927 Pet. App. 12j-22j. The district court offered three reasons for preserving the settlement agreement. First, it opined that the mandamus and certiorari petitions pending in this Court meant that the court of appeals' mandate "was not final at the time of the settlement" and therefore did not bind the parties or the district court. 89-927 Pet. App. 22j-23j. Second, the district court reasoned that the court of appeals had disapproved only the district court's exercise of its equitable power and had not taken away its power to approve a settlement stipulation, even if that stipulation was inconsistent with the appellate mandate. 89-927 Pet. App. 23j-24j. Third, the district court ruled that the U.S. Attorney had effectively joined the settlement agreement, thereby surrendering the United States' interest in the reserve fund, when members of the U.S. Attorney's Office indicated orally to lawyers for the other parties that their Office did not object to the settlement. 89-927 Pet. App. 27j-30j. The district court acknowledged that under long-established federal regulations, authority to compromise a claim of this magnitude rests solely with the Attorney General or the Deputy Attorney General, and that neither the United States Attorney nor his subordinates have authority to enter into such an agreement. See 28 C.F.R. 0.160(a)(2), 0.161, 0.168(a), and Appendix to Subpt Y, Sec. l(c)(2). But the district court held those regulations inapplicable because it deemed the settlement not to be a "money claim" within their terms. 89-927 Pet. App. 28j.

6. The United States petitioned the court of appeals for a writ of mandamus to enforce the court's earlier mandate

and appealed from the district court's order.[6]

In its mandamus petition, the United States relied on the plenary power of an appellate court to enforce its mandate. The government noted that the court of appeals' earlier mandate regarding the disposition of the reserve fund had obviously been violated, and that the parties could not devise among themselves (and the district court could not approve) a settlement contrary to the mandate, especially in a class action under Federal Rule of Civil Procedure 23. The United States renewed its contention that the U.S. Attorney lacked authority to surrender the interest of the United States in the reserve fund, and added that the government may not be bound by unauthorized oral statements from the U.S. Attorney's Office on any theory of estoppel. Finally, the United States contended that its intervention motion had been timely, but that, even if the motion was untimely, the United States was empowered to enforce the mandate as if it were a party under Rule 71 of the Federal Rules of Civil Procedure, which provides that when an order is made "in favor of a person who is not a party to the action," the person "may enforce obedience to the order by the same process as if a party."

The court of appeals affirmed in part and reversed in part. It recognized that the settlement agreement "was not in keeping with the mandate of this court," and that "it was not * * * the prevailing parties who purported to give the balance of the fund away, but the [Administration] Comm[ittee] and the district court, neither of which had any rights to the money they distributed." 89-927 Pet. App. 6b, 9b.

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[6] Because the court of appeals' original mandate did not remand the case to the district court, it is not clear that the district court had jurisdiction to enter further orders regarding the reserve fund.

Nonetheless, the court of appeals refused to permit the United States to enforce the terms of the court's original mandate, which had directed that the surplus funds be deposited in the Treasury "in the name and to the credit of the United States" as required by 28 U.S.C. 2042. The court of appeals considered at length whether the Department of Justice's regulations authorized the U.S. Attorney to consent to the settlement agreement, but although the court questioned the government's interpretation of the regulations, it ultimately declined to resolve that question. 89-927 Pet. App. 10b-13b. Instead, the court held that the United States was estopped from denying the authority of the U.S. Attorney's Office to consent to the settlement agreement. 89-927 Pet. App. 13b-14b. The court concluded that by virtue of this estoppel, "any interest the United States may have had under 28 U.S.C. § 2042 is extinguished." 89-927 Pet. App. 14b. The court indicated that the same considerations which supported estoppel made the government's attempt to intervene under Rule 24(a) untimely. 89-927 Pet. App. 14b.

Although the court of appeals held the United States estopped, it made no attempt to explain how the traditional requirements of estoppel were satisfied here, nor did it identify any affirmative misconduct on the part of the government. See 89-927 Pet. App. 13b-14b. Under established Seventh Circuit precedent, the government may not be estopped unless all of the traditional elements of estoppel are present and the government is further shown to have engaged in "affirmative misconduct." See, *e.g.*, *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982). The court of appeals alluded to this authority, but apart from noting that the U.S. Attorney's actions had prejudiced the other parties and the court's earlier mandate, the court offered no explanation for its estoppel ruling. 89-927 Pet. App. 13b.

Because the United States was deemed to have no further interest in the reserve fund, the court of appeals declined to disturb the distributions to the class claimants who had already been paid, despite the fact that the original Seventh Circuit panel had ruled that additional payments to previously compensated plaintiffs should not be made. 89-927 Pet. App. 14b.[7] At the same time, however, the court of appeals held that its mandate had been impermissibly violated by the grants to the law schools for antitrust research, a disposition which bore too close a resemblance to the research foundation the court of appeals had disapproved in its first opinion. 89-927 Pet. App. 14b-15b. Accordingly, the court of appeals ordered that the grants to the law schools be retrieved, and that the funds be distributed at the discretion of a new district judge under the *cy pres* doctrine. 89-927 Pet. App. 15b-16b.

The class plaintiffs and the district judge separately sought rehearing en banc. The rehearing petitions were denied without opinion on September 15, 1989. The district judge subsequently filed a petition for a writ of mandamus or prohibition or, in the alternative, a petition for a writ of certiorari on December 11, 1989 (No. 89-927). The class plaintiffs and the Administration Committee filed separate petitions for writs of certiorari on the same date (Nos. 89-992 and 89-1081).

ARGUMENT

More than six years have passed since the beginning of the controversy over the reserve fund, and the underlying class actions themselves will soon enter their fifteenth year. Like the petitioners—although for very different reasons—

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[7] The court did hold that no further payments could be made to this group, or to the defendants, or to any future late claimants. 89-927 Pet. App. 16b.

the United States disagrees with the court of appeals' latest ruling.[8] But the court's decision presents no legal issue of sufficient importance, and no result of sufficient consequence, to warrant further review by this Court.

1. The sequence of events that led to the current decision of the court of appeals was highly irregular and is unlikely to recur. The controversy began with a substantial unclaimed remedial fund to which no private party had a valid legal claim. The conflicting claims to the fund led to a remedial order which was overturned on appeal. Certain of the parties then negotiated a post-appeal settlement that plainly violated the appellate mandate, but rather than seeking relief from that mandate in the court of appeals, the parties turned to the district court. The district court approved the settlement, then was met with a post-settlement motion for relief by the beneficiary of the original appellate mandate. Finally, when the beneficiary's motion for relief was denied, a second appeal ensued to determine the effect of the settlement and the original appellate mandate.

This is a sequence of events which, it may fairly be hoped, will not be repeated. Because the court of appeals' decision depends so heavily on the peculiar circumstances of this case, including the scope of the Seventh Circuit's own prior mandate and the events following that court's first decision, the latest ruling is not likely to have general significance beyond the confines of this case. For better or worse, the court of appeals saw its task as bringing an end to the near-interminable controversy over the disposition of the reserve fund. 89-927 Pet. App. 8b-9b. The court of appeals did not purport to establish, and did not in fact establish, any more general principles of law. In sum, this is a unique decision

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[8] The United States' disagreement with the court of appeals' estoppel ruling is described in our cross-petition in this case.

which rests on a unique set of facts, and its novelty counsels strongly against plenary review by this Court.

2. In an effort to invest the decision below with greater significance, the petitioners in No. 89-927 and 89-992 contend that the court of appeals disregarded settled limitations on its jurisdiction under Article III of the Constitution. 89-927 Pet. 11-17; 89-992 Pet. 3, 9-10. The petitioners argue, in essence, that if parties settle a case on terms inconsistent with a binding prior mandate of an appellate court, Article III bars the appellate court—even this Court—in all circumstances from enforcing its outstanding mandate. Cf. 89-927 Pet. 7. Under petitioners' theory, the settlement provides a safe harbor in which the parties can violate appellate mandates with impunity.

The short answer to petitioners' argument is that it is at odds with this Court's own precedents. Those precedents make clear that a court's power to enforce its mandate may not be unilaterally circumscribed by an agreement of the parties that is inconsistent with the terms of the mandate.

For example, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), an antitrust action, the Court noted that in an earlier opinion it had ordered "divestiture without delay," *id.* at 131. Divestiture did not take place as required by this Court's mandate, however, and parties who were denied intervention in the remand proceedings appealed. On appeal, the United States contended that the divestiture issues were not properly before the Court because the United States, as the antitrust plaintiff, had agreed to a settlement of the litigation after this Court's first ruling. *Id.* at 131-132, 136. This Court rejected that contention: "We do not question the authority of the Attorney General to settle suits after, as well as before, they reach here. The Department of Justice, however, by stipulation or otherwise[,] has no authority to circumscribe the power of the courts to see that our mandate is carried out." *Id.* at 136.

Similarly, in *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), on remand from this Court, the United States asserted that the district court could consider only the remedy proposed by the government. When the case returned to this Court, the appellees argued that the government was then estopped from urging other remedies before this Court. 366 U.S. at 325 n.6. The Court, noting its "plenary power" to see that the lower court followed its earlier ruling, rejected the appellees' argument because "no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out." *Id.* at 326 & n.6. See also *Utah Public Service Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969) (Supreme Court not required to dismiss case, despite unanimous request by parties to do so, when case raises question of district court's compliance with Supreme Court's prior mandate).

The courts of appeals likewise insist that an appellate court's power to enforce its mandate is not terminated by a subsequent settlement that is at odds with the terms of the mandate. See, *e.g.*, *ATSA, Inc.* v. *Continental Insurance Co.*, 754 F.2d 1394, 1396 (9th Cir. 1985) ("[e]ven at the joint request of the litigants, the district court may not deviate from the mandate of an appellate court"); *Slotkin* v. *Citizens Casualty Co.*, 698 F.2d 154, 155 (2d Cir. 1983) (the rule that a lower court must faithfully execute the mandate of the court of appeals "prohibits litigants from circumventing such lower court compliance by stipulation or otherwise"). Thus, the court of appeals in this case was hardly departing from settled Article III jurisprudence, as the petitioners suggest, when it partially overturned the settlement agreements as contrary to its prior mandate.[9]

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[9] For similar reasons, the existence of the court of appeals' mandate vitiates petitioners' claims that the decision below undermines the set-

The petitioners' challenge to the court of appeals' power is particularly misconceived because this litigation involves the settlement of class action claims. Because class action settlements may affect interested persons other than those immediately before the court, Fed. R. Civ. P. 23(e) prohibits class actions from being compromised without the prior approval of the district court. We are aware of no authority, and the petitioners have offered none, that suggests that this authorization for district court review of proposed class action settlements runs afoul of Article III. And if a district court may review a class action settlement without exceeding its powers under Article III, it is difficult to imagine how Article III could bar an appellate court—including this Court—from undertaking the same task.[10]

Ironically, under petitioners' reasoning *no court*, not even the district court, had Article III jurisdiction because no live case or controversy existed with respect to the reserve fund. At the time the parties to the civil antitrust litigation entered into negotiations over the fate of the reserve fund, the district court had ruled, and the court of appeals had affirmed, that no party had a legal or equitable interest in any amount remaining in the reserve fund after payment of late claims. It is difficult to visualize how the "parties"

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tlement process and discourages attorneys from serving on administrative committees. 89-927 Pet. 17-20; 89-1081 Pet. 2. The prior, outstanding appellate mandate provided ample notice that the parties could not enter into settlement negotiations directly contrary to the mandate, and that the members of the Administrative Committee should not expect compensation for professional services rendered to make disbursements inconsistent with that mandate.

[10] Petitioners' generic authorities merely state that a court may not act in the absence of jurisdiction and a live case or controversy. See 89-927 Pet. 13 n.14, 14-15; 89-992 Pet. 9-10 & n.2. The cited cases shed little light on the question whether the court of appeals had jurisdiction to enforce its prior, outstanding mandate.

could compromise a "dispute" over money to which they had no greater claim than any other citizen of the United States.

3. The only other contention by the petitioners which merits comment is their claim that the decision in this case conflicts with this Court's decision in *United States* v. *Munsingwear*, 340 U.S. 36 (1950), and its progeny. That claim is simply incorrect.

In *Munsingwear*, this Court held that when a case becomes moot during the course of appellate review through "happenstance," the party seeking appellate review is entitled to have the judgment of the lower court vacated. 340 U.S. at 39-40. This Court has applied the *Munsingwear* rule only when a case has become moot "due to circumstances unattributable to any of the parties." *Karcher* v. *May*, 484 U.S. 72, 83 (1987). Even when *Munsingwear* applies, moreover, a party that has *failed* to avail itself of its right to have a lower court judgment vacated may not thereafter avoid the effects of the judgment. In *Munsingwear* itself, this Court held that the United States was bound by a prior district court judgment, even though the case had become moot on appeal, because the United States had not asked the court of appeals to vacate the district court's judgment. 340 U.S. at 38-41.

In this case, even if one assumes that the parties' March 1985 settlement agreement rendered the controversy over the reserve fund moot, that the resulting mootness came about because of "circumstances unattributable to any of the parties," *Karcher*, 484 U.S. at 83, and that an ungranted petition for discretionary review should be treated the same as an appeal as of right for purposes of the doctrine governing mootness on appeal—even if all these prerequisites are assumed—then petitioners still had to respect the outstanding court of appeals' mandate because they failed to have it vacated as moot. Cf., *e.g.*, *Walker* v. *City of*

Birmingham, 388 U.S. 307, 316-317, 320-321 (1967) (parties may not ignore injunction notwithstanding strong arguments that statute authorizing injunction was facially overbroad under the First Amendment and that injunction itself contravened the First Amendment); *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947) (parties may not ignore injunction issued by court arguably without jurisdiction to do so). Indeed, petitioners occupy no better position than did the United States in *Munsingwear*, which forfeited its right to have the district court judgment vacated and was accordingly bound by the judgment thereafter. The parties here did not seek to have the court of appeals' mandate vacated when they dismissed their petitions before this Court. For that reason, *Munsingwear* is entirely consistent with the court of appeals' enforcement of its mandate in this case.

As petitioners observe, several courts of appeals have gone beyond *Munsingwear* to hold that a district court's judgment must be vacated if the parties settle their controversy on appeal, while other courts have held that the judgment need not be vacated in such circumstances. Compare *Federal Data Corp.* v. *SMS Data Prods. Group, Inc.*, 819 F.2d 277, 279-280 (Fed. Cir. 1987), and *Kennedy* v. *Block*, 784 F.2d 1220, 1225 (4th Cir. 1986), with *National Union Fire Ins. Co.* v. *Seafirst Corp.*, No. 88-3970 (9th Cir. Dec. 12, 1989), and *In re Memorial Hospital*, 862 F.2d 1299, 1301-1303 (7th Cir. 1988). In each of these cases, however, the issue was whether a party that has acted in a timely fashion is entitled to have a lower court's judgment vacated—not whether, as here, the party may disregard the judgment with impunity when it has "slept on its rights," *Munsingwear*, 340 U.S. at 41, by failing to apply for vacatur. Thus, even assuming that the conflict identified by petitioners merits this Court's attention, this case is not an appropriate vehicle to resolve it.

CONCLUSION

The petition for a writ of mandamus or prohibition or, in the alternative, for a writ of certiorari in No. 89-927, and the petitions for a writ of certiorari in No. 89-992 and No. 89-1081, should be denied.

Respectfully submitted.

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Nos. 89-927, 89-992 and 89-1081

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN RE HUBERT L. WILL, Senior Judge, United States District Court for the Northern District of Illinois,
Petitioner,

CERTIFIED PLAINTIFF CLASS IN MDL-250,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*,

FOLDING CARTON ADMINISTRATION COMMITTEE: THOMAS J. BOODELL, JR., PERRY GOLDBERG, JAMES B. SLOAN and ALEXANDER R. DOMANSKIS,
Petitioner,

v.

FOLDING CARTON RESERVE FUND, *et al.*

ON PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION AND PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT REPLY OF PETITIONERS TO GOVERNMENT'S BRIEF IN OPPOSITION

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JOINT REPLY OF PETITIONERS TO GOVERNMENT'S BRIEF IN OPPOSITION

Petitioners in Nos. 89-927, 89-992 and 89-1081 jointly file this brief in reply to the Government's opposition to their Petitions for review.

ARGUMENT

1. All parties to the proceedings below agree that the court of appeals' judgment was incorrect. The Government concurs. No one has come forward to support what the Seventh Circuit judges did. Even the judges themselves, respondents in *In re Hubert L. Will*, No. 89-927, have declined to present reasons why their decision should be upheld.

2. The Government's Brief in Opposition concedes that the court of appeals' decision was wrong, but says that it should not be reviewed because it is "unique" and "novel," and that its "peculiar circumstances" present no "legal issue of sufficient importance, and no result of sufficient consequence, to warrant further review by this Court." (Br. at 15-16.) On the contrary, we respectfully suggest that the "peculiar circumstances"—the unprecedented abuse of appellate court authority below—constitute an argument for and not against review.

When a court of appeals enforces its own desires as to how funds subject to a settlement agreement should be disbursed—contrary to the wishes of every party and every interested non-party—that is an error that is sufficiently serious to be addressed the *first* time it occurs. The principal vice in this matter is that the court below exceeded its constitutional power and acted *sua sponte* and not at the request of any party.

The Constitution gives power to judges only in cases or controversies to be decided between contending

parties, in which the courts themselves have no interest and with respect to which their judgment will be impartial and so regarded. Here, there were no contending parties. The court of appeals judges acted on their own views of public policy and in excess of the powers granted to them under the Constitution. The errors committed by the court below thus derive from its abandonment of the case or controversy requirement of article III—a matter of enormous and dangerous significance.

The Government's brief expresses the "hope[ ]" that the "sequence of events" that led to the filing of Petitioners' Petitions "will not be repeated." (Br. at 15.) If this Court fails to correct the court of appeals' errors, however, the opposite is the more likely result. Innumerable cases, including class actions, are routinely settled after a trial court's judgment is entered or an appellate court's mandate is issued. In almost all, the settlement varies from the trial court's judgment or the appellate court's mandate—that is why the parties settle. If the courts' own views are permitted to become an impediment to settlements, the ability to achieve settlements, which are encouraged in the interest of judicial economy and as a matter of public policy, especially with respect to class actions, will be substantially diminished.

3. The Government erroneously contends that the precedents of this Court and the courts of appeals "make clear that a court's power to enforce its mandate may not be unilaterally circumscribed by an agreement of the parties that is inconsistent with the terms of the mandate." (Br. at 16.) The settlement herein was not "unilateral"; it was a settlement agreed upon by all the parties and unopposed by any

interested non-party (including, in all pertinent respects, the Government).[1] There is no precedent—none whatever—for a court to exercise a roving authority to modify a settlement that it does not like even though no party or interested non-party objects to it.[2]

In each of the cases cited by the Government, some party or interested non-party objected to a settlement and asked that the court's mandate be carried out.[3]

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[1] The Government did, of course, register an untimely objection to the settlement, claiming the funds should escheat to the federal treasury, but the court of appeals held that the Government lacked standing and rejected escheat. The vacatur of the law school grants ordered by the court below had not been sought by the Government or by anyone else; it was strictly the judges' own idea.

[2] We note that the court of appeals did not set aside all aspects of the settlement that were inconsistent with its prior decision and mandate. The 1989 panel acknowledged, for example, that 28 U.S.C. § 2042 was not applicable even though the 1984 panel had held otherwise. The 1989 panel held that the *cy pres* doctrine—not section 2042—governed the distribution of any residue in the settlement fund. It also held that the additional distribution to plaintiff class members as provided in the settlement was proper even though the 1984 panel had denied them any further distribution. The only provisions of the settlement disapproved below were the grants to the two law schools. The court had no authority to rewrite the contract of settlement between the parties, approving one part and rejecting another. *See Imperial Fire Ins. Co.* v. *Coos County*, 151 U.S. 452, 462 (1894); *Davies* v. *Continental Bank*, 122 F.R.D. 475, 478 (E.D. Pa. 1988).

[3] For example, in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the State of California and certain private entities that would have benefited from a divestiture ordered by this Court objected to a subsequent settlement that did not require complete divestiture. Noncompliance with the same divestiture order was alleged in *Utah Public Ser-*

In each of these cases, the court acted to ensure that its mandate was carried out to protect the interests of the objecting parties who were properly before the court. In each, there was a genuine case or controversy that the court undertook to resolve.

That was *not* the case here. In the instant case, the court of appeals did not purport to protect the interests of any party before the court, or even the interests of any non-party. The court of appeals, contrary to the interests and wishes of all parties, advanced solely its own fixed idea that the funds should

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vice Comm'n v. *El Paso Natural Gas Co.*, 395 U.S. 464 (1969), by consumer spokespersons who briefed and argued the case before this Court. Similarly, in *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), the Government objected that the district court's acceptance of du Pont's proposed divestiture decree, which did not provide for complete divestiture, was contrary to this Court's mandate.

The court of appeals cases cited by the Government are also inapposite because they, too, involved objections by parties to alleged instances of noncompliance with the appellate court's mandate. *ATSA, Inc.* v. *Continental Insurance Co.*, 754 F.2d 1394 (9th Cir. 1985), involved a petition for a writ of mandamus by two of several parties to an arbitration agreement who contended that the district court had entered an order inconsistent with the court of appeals' mandate.

In *Slotkin* v. *Citizens Casualty Co.*, 698 F.2d 154 (2d Cir. 1983), the appellants had been given two alternatives in a prior court of appeals decision: (1) to reinstate a $680,000 verdict and judgment against four of the original defendants or (2) to retry the case against all of the original defendants except one. Instead, appellants settled with four defendants and attempted to retry the case against the others. The other defendants objected and the district court dismissed the complaint against them on the ground that the plaintiffs had not complied with the appellate court's mandate. The court of appeals affirmed.

not be disbursed for the particular purposes of studying the antitrust laws or the performance of juries in complex cases.

We do not dispute that a court—trial or appellate—has authority to enforce its judgment or mandate if some interested person raises the issue of whether it is being carried out. We do dispute that a court may modify on its own motion a settlement to which no one objects. That broad and dangerous extension of the law is indeed unique and novel and should be put to early rest by this Court.

4. The courts' authority to review class action settlements pursuant to Fed. R. Civ. P. 23(e) is not at issue. Approval is required to protect the interests of non-litigant class members, *see Jenson* v. *Continental Fin. Corp.*, 591 F.2d 477, 482 n.7 (8th Cir. 1979)—for example, to prevent a fiduciary from unfairly discriminating against some persons as opposed to others in the distribution of funds. It is *not* a mechanism that authorizes the courts, in the absence of any objection from or prejudice to class members and in the absence of any case or controversy, to modify proposed settlement agreements because of their own preferences.

5. The Government suggests (Br. at 15) that "the court of appeals saw its task as bringing to an end the near-interminable controversy over the disposition of the reserve fund" and implies that denial of the pending Petitions will somehow facilitate achieving that end. In fact, it will have a contrary effect. The court of appeals' actions undid a final distribution process that was near completion and that would have concluded the lengthy *Folding Carton* litigation.

By operation of the settlement, all but $600,000 of the $6,000,000 residual fund had been distributed prior to the court of appeals' August 9, 1989 opinion. Distribution of the remaining $600,000 would have been accomplished quickly had the 1989 panel not set aside the law school grants and ordered that a new judge take over disposition of the fund.

The court of appeals' action, if not reversed, will mean that the Honorable Ann C. Williams, to whom the case has been assigned on remand, will have a fund of well over $2,000,000[4] in which any organization in the country believing that it can justify a grant under the *cy pres* doctrine can seek to share. Already, a number of grant applications from a variety of applicants—law schools, legal assistance organizations, legal think tanks, attorneys general of various states, the Federal Judicial Center Foundation and others—have been received. If this Court denies the pending Petitions and permits the court of appeals' order to stand, there undoubtedly will be many more.

How long it will take the new judge to determine which of the new applications to approve (the old grants being prohibited) is impossible to predict, especially since the court of appeals purports to retain jurisdiction over the distributions, presumably for the purpose of approving or rejecting them even though no one objects—another proposed *sua sponte* intervention. Certainly, this new process will not be as

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[4] The court of appeals opinion requires the two law school grants totalling $1,356,000 to be restored to the fund bringing the total undistributed fund, including accrued interest, to over $2,000,000.

expeditious as Judge Will's disposition pursuant to the settlement of the last $600,000 to Chicago area law schools.

6. The decision below also directed that no fees be paid to the lawyers for work performed assisting the district court in the proposed distributions to Chicago law schools. If that decision is allowed to stand, it will substantially limit the ability of district courts to enlist the aid of lawyers in administering complex litigation. Lawyers will be less willing to devote their time to such efforts if the rule is that reasonable compensation for such services promised by the district court may be denied at the whim of a court of appeals, even if there is no objection. The decision below thus poses a grave threat to the orderly resolution of complex cases, and this Court should act promptly to correct the matter.

7. The Government also erroneously contends that the 1984 panel's mandate remained and remains binding on the parties because they did not go back to the panel after settling the case to have the mandate vacated. But there is no magic to an appellate mandate; it is simply a tool for resolution of a case or controversy. When all interested persons settle a matter, no case or controversy continues to exist, and it is folly to suppose that an appellate court has the power to go back and enforce its mandate against everyone's wishes.

If every time parties settled a case on terms different from the judgment or mandate—as is almost always the case—they were required to go back to court to get the judgment or mandate formally vacated, the settlement process would become more cumbersome, the courts would be burdened with a

pointless exercise, and settlements would be jeopardized if the courts declined to vacate. This is yet another unfortunate implication of the opinion below, and the Court should correct it.

8. The Government makes no reference to several other serious errors noted in our Petitions, which must be corrected before they become precedents. These include the panel's erroneously:

> 1. Converting a mandamus action into an ordinary appeal, denying a motion to treat the action as a mandamus proceeding, and then deciding it by the standards governing ordinary appeals rather than the higher standards applicable to mandamus actions.
>
> 2. Holding that funds generated in what was then the largest antitrust case in history may not, under the *cy pres* doctrine, be used to study the antitrust field or the role of juries in complex cases.
>
> 3. Ordering that a complex multidistrict case be transferred from the judge who had presided over it successfully from its inception, and supervised the creation of a fund of over $230,000,000 and the distribution of over $229,400,000 of that fund, to a new judge.
>
> 4. Reserving jurisdiction to review *sua sponte* the new judge's grants even though no one objects to them.

* * *

The basic vice of the court of appeals' judgment in this case was its failure to observe the judicial function of deciding cases and controversies and, instead,

proceeding on a detour of its own. This is the cause of all the difficulties pointed out herein and in Petitioners' Petitions, and the reason that it is important that this matter be decided by this Court rather than allowing the lower court's unconstitutional judgment to remain in effect.

CONCLUSION

For the reasons set forth above and in the pending Petitions, the Court should issue a writ of mandamus or prohibition or certiorari to prevent the important unfortunate consequences of the decision below.

Respectfully submitted,

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